Shell’s Responsibility for Climate Change

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On 26 May 2021, the District Court of the Hague rendered a judgment in the *case Milieudefensie v Royal Dutch Shell* that can rightly be called revolutionary. This is the first judgment of its kind in which a multinational corporation is held responsible, in part based on international law, for its contribution to climate change. While of course we have to await the appeal, that no doubt will be filed by Shell, the potential effects for Shell and for similar corporations are significant.

In this comment, I reflect on this judgment from the perspective of international law. While the judgment is grounded in Dutch tort law – and many aspects call for an analysis from the perspective of corporate governance – the international law aspects of the judgment deserve attention. I focus on two aspects that transcend the peculiarities of Dutch law and that may serve as a source of inspiration for litigation elsewhere. The first aspect is the role of international law in shaping Shell’s obligations (2); the second aspect is the Court’s approach to the question on how Shell’s responsibility related to that of other actors, to its shared responsibility (3). However, first, I will briefly summarize the facts and main holding (1).

1. Facts and holding

The case was brought as a public interest class action by *Milieudefensie* (the Dutch branch of Friends of the Earth International) on behalf of itself and 17,379 individual claimants, and six other NGOs. Based on the test for class actions set forth in the Dutch Civil Code (Book 3 Section 305a), the Court found that plaintiffs could bring a class action in the common interest of preventing dangerous climate change, since the interests of current and future generations *of Dutch residents* ‘are suitable for bundling so as to safeguard an efficient and effective legal protection of the stakeholders’ (par. 4.2.4.). However, the Court rejected claims in the interests of current and future generations *of the world’s population*; these claims would not be suitable for bundling since ‘there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO2 emissions’ (par. 4.2.3).

The defendant, Royal Dutch Shell (RDS), is a public limited company established under the laws of England and Wales with its head office in The Hague, and the parent company of the Shell group which develops activities worldwide. The District Court determined that as the top holding company, RDS establishes the general policy of the Shell group (par 2.5.1 and par 4.4.4).

The Court found that the total emissions of carbon dioxide (CO2) of the Shell group exceeded the emissions of many states, including the Netherlands and that

their global CO2 emissions contribute to global warming and climate change in the Netherlands, and the Wadden region (par. 4.4.5). It also found that this had significant risks for residents of the Netherlands, in the form of health risks and deaths due to climate change-induced hot spells, as well as health problems and an increased mortality risk due to increasing infectious diseases, deterioration of air quality, increase of UV exposure, an increase of water-related and foodborne diseases, as well as water-related health risks, which the Netherlands and the Wadden region will face, including flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinization, raised water levels and drought (par. 4.4.6). These risks were relevant both in terms of standing, and in terms of the eventual assessment of human rights (more about that below).

Against this background, the case then revolved around the question whether or not RDS had an obligation to reduce CO2 emissions of the Shell group's entire energy portfolio (par. 4.1.1). The Court agreed with plaintiffs that RDS indeed had such an obligation, holding

- that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% by the end of 2030 relative to 2019 through the Shell group's corporate policy (par 4.1.4 and par. 4.4.55),
- that 'the policy, policy intentions and ambitions of RDS for the Shell group' imply 'an imminent violation of this obligation', and
- that therefore the Court allowed the claimed order for compliance with this legal obligation (par. 4.5.3).

While granting this part of the claim, the Court rejected claims relating to the *current* unlawfulness (since the arguments of the plaintiffs related to the policy for 2030) and the unlawfulness of *future* actions of Shell (since RDS is in the process of adapting its policy) (par. 4.5.10).

2. How international law was relevant to Shell's responsibility

The judgment was only indirectly based on international law. The claim by *Milieudefensie* was primarily based on Dutch tort law. In this regard, in a first step, the Court agreed that Dutch law was the applicable law, after an interpretation of art 7 of Regulation 864/2007 on the law applicable to non-contractual obligation (Rome II), holding that the adoption of the corporate policy of the Shell group constitutes an independent cause of the damage in terms of this regulation, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents (par. 4.3.6).

Given the applicability of Dutch law, the answer to the question whether RDS had a CO2 reduction obligation then was grounded in the standard of care as developed in Dutch case law based in tort as held in Book 6 Section 162 Dutch Civil Code. The standard stipulates that 'acting in conflict with what is generally accepted according to unwritten law is unlawful'.

It is this standard that opened the door to international law: RDS must observe the due care exercised in society (4.41), and what due care is to be exercised in society depends on a range of factors that may include international law. This argument as such is not new (see my 2000 piece *Public international law in transnational litigation against multinational corporations: prospects and problems in the courts of the Netherlands*), but the Court gave it a particular extensive application. Three steps in this interpretative process stand out.

First, the Court held that due care required Shell to comply with international human right obligations. This did not mean that Shell had direct obligations under human rights law. The Court found that the right to life and the right to respect for private and family life of Dutch residents under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) apply in relationships between states and citizens, and that *Milieudefensie* could not *directly* invoke these human rights with respect to RDS. However, it also found that 'due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between *Milieudefensie* and RDS' and that therefore 'the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care' (par. 4.4.9).

In its interpretation of the relevance of human rights, the Court followed the groundbreaking Urgenda judgment, where the Dutch Supreme Court found that art. 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to CO2 emissions induced global warming, also referring to the practice of the UN Human Rights Committee and the UN Special Rapporteur on Human Rights (par. 4.4.9).

Second, in its interpretation of the unwritten standard of care, the Court followed the UN Guiding Principles on Business and Human Rights (UNGP), which it found to 'constitute an authoritative and internationally endorsed 'soft law' instrument setting out the responsibilities of states and businesses in relation to human rights.' (par. 4.4.11). This part of the judgment will be of much interest for those studying human rights responsibilities of corporations. While the Court noted that the UNGP 'do not create any new right, nor establish legally binding obligations', they 'are suitable as a guideline in the interpretation of the unwritten standard of care' (par. 4.4.11). In this context, the Court gave a particular sweeping interpretation to the scope of such obligations, as it held that 'the responsibility to respect human rights encompasses the company's entire value chain' and that this includes the end-users of the products produced and traded by the Shell group (par. 4.4.18) at the end of RDS' value chain.

This aspect of the judgment has drawn particular attention (and on the side of RDS, concern). In effect this meant that RDS had a 'best efforts' obligation and had to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by its business relations, and to use its influence to limit any lasting consequences as much as possible (4.4.55).

Third, in construing the scope of RDS's reduction obligation (what did RDS need to do to prevent dangerous climate change?*)* the Court relied on the 2015 Paris Agreement. The Court found that the goals of the Paris Agreement represent the best available scientific findings in climate science, supported by widespread international consensus and therefore were relevant in the interpretation of the unwritten standard of care (4.4.27). It then found that the goals of the Paris Agreement are derived from the IPCC reports (4.4.27) and that these reports support the conclusion that the appropriate reduction target is a net 45% reduction of CO2 emissions in 2030, relative to 2010 levels. It is these reduction pathways that 'offer the best possible chances to prevent the most serious consequences of dangerous climate change' (par. 4.4.29). The Court emphasized that this does not formulate a legally binding standard for RDS, but that this broad consensus was relevant in its interpretation of the unwritten standard of care (par. 4.4.29).

To buttress the conclusion that the Paris goals were legally relevant for RDS, the Court found it relevant that under the Paris Agreement, the signatories ensured support of non-state stakeholders (2.4.7). The Court left unanswered the question whether RDS could be designated as a 'non-Party stakeholder' in the terms referred to by the Climate Ambition Alliance established at the Conference of the Parties in Madrid in 2019 (COP 25) but simply found that the signatories emphasized that the reduction of CO2 emissions and global warming cannot be achieved by states alone and that there was broad international consensus about the need for non-state action (par. 4.4.26).

Together with a range of other interpretative factors, the Court then concludes that the human rights standards, the UNGP and the Paris agreement all support the conclusion that RDS should be ordered to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy.

3. How is Shell's responsibility related to responsibility of other actors

One line of defense of RDS that is of wider relevance was that it was only one of many contributors to climate change. This echoed the argument of the Dutch State in *Urgenda* that the problem of climate change is caused by contributions of a large number of states and other actors, that the Dutch proportion in global emissions is negligible, and Dutch reductions therefore are not the sole cause of the global problem of climate change. The Supreme Court in *Urgenda* rejected this argument, holding that the Netherlands was subject to its own independent obligations and thereby bound to do its part to prevent harmful climate change, as defined by these obligations.

The District Court's approach in the Shell case is comparable. RDS argued that that the energy transition must be achieved by society as a whole, not by just one private party. The Court agreed that 'dangerous climate change is a worldwide problem, which RDS cannot solve on its own', that cooperation by different actors is

required, and that ‘the division of responsibility among the various actors are points of attention’ (4.4.52). However, it found that this does not in any way reduce the obligation or responsibility of RDS.

Indeed, the Court even uses the fact that RDS was only one of many actors even to justify its holding that RDS not only had obligations for its own emissions but also for emissions of suppliers and end-users (par. 4.4.33). So, the fact that multiple parties contribute in effect adds to, rather than reduces, the obligation of RDS.

More generally, the Court found that given the ‘broad international consensus that each company must independently work towards achieving net zero emissions by 2050’, RDS may be expected to do its part (par. 4.4.36). The fact that RDS is not the only party responsible for tackling dangerous climate change in the Netherlands did not absolve RDS of its individual partial responsibility to contribute to the fight against dangerous climate change according to its ability. (par. 4.4.37). Here it was relevant that the emissions of RDS were not minor at all, as the Court considered that RDS ‘is the policy-setting head of the Shell group, a major player on the fossil fuel market and responsible for significant CO2 emissions, which incidentally exceed the emissions of many states’ (par. 4.4.37). Hence, RDS must do its part with respect to the emissions over which it has control and influence. It is an individual responsibility that falls on RDS.

4. Conclusion: shared responsibility on climate change

This is yet another judgment by a Dutch court that covers new ground and opens new avenues, following such high profile judgments in cases relating to Srebrenica, Indonesia, and the Urgenda judgment. While there are many Dutch judgments that are more conservative, this is again a show of courage in Dutch Courts to address controversial issues with wide ramifications, head on.

The judgment is rather sweeping, not a-typical for a District Court, in which the Court sometimes makes bold assertions and at times even cuts corners. At several places, upon quick reading an observer may wonder how the Court got from A to B. Surely the pronouncements on the scope of RDS’s obligations, in particular in relation to the end users, may proof controversial.

The dust on what the judgment means in practice still has to settle. How can RDS comply with the obligations to cut its own emissions – here reduction of the leakage of methane and curbing the practice of flaring might be options. But disinvestment in Shell’s activities also has been mentioned as a necessary option. Even more complex is the question what RDS can do (under its best-efforts obligation) to reduce emissions by suppliers (should RDS pressure them?) and end-users, including use of cars and planes. It is thought that this accounts for 85% of all RDS emissions. Supply of green energy is an obvious path, but at what costs?

Be this as it may, the approach of the Court to the international legal position of corporations is less sweeping. It took a rather reserved position on the international

legal obligations of multinational corporations, emphasizing that human rights did not apply directly, that the UNGD did not establish hard law, and that the Paris agreement was not binding for corporations.

The legal implications of international norms for RDS were fully grounded on the open norm in Dutch tort law, which enabled "reading international law into" the standard of due care as based on the Dutch civil code. While *Urgenda* brought in reduction targets in the interpretation of human rights obligations, this Court takes a short cut and uses the targets to interpret due care obligation. This, of course, is a peculiarity of Dutch law, but then again it is a common practice of courts in many states to interpret open norms of national law in the light of international law (see chapter 7 of my National Courts and the International Rule of Law). In this respect this reasoning may well be of wider relevance.

Even so, this approach raises fundamental questions. Surely there are limits to the possibility to read international law norms, and certainly soft law, into open norms of national law. One question is the relative power of courts to use non-binding norms to fill in open provisions of Dutch law. In this regard, we might be reminded of the Australian Teoh case, which caused some backlash in stating that if international law norms are not brought in through the front door by Parliament, it is not for a Court to bring them in through the backdoor. However, it should be observed that in this case, the Court's approach was highly contextual, and that the international law norms were only a few out of many elements that eventually gave meaning to the due care standard.

And then there is the question whether there are limits to the degree in which a Court can or should give domestic binding effect to norms or targets that internationally were not meant to be binding. In our blogpost of Urgenda, we recalled that almost 40 years ago, Prosper Weil noted that there is no warrant for considering that 'by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantory effect: the accumulation of non-law or prelaw is no more sufficient to create law than is trice nothing to make something' (p. 417). On this point one might say that since the Supreme Court in *Urgenda* had already found the standards stipulated by COPs relevant for the interpretation of the ECHR, it was not a big step to use them to interpret a due care standard under domestic law. Still, the relationship between norms that intentionally were not binding internationally and are given binding effect domestically (even if indirectly) is an uneasy one.

While it is true that the Court read a lot into a due care standard, one may also reverse the perspective. Would it not be odd to say that RDS *would* act with due care if it were to contribute emissions in a manner that interferes with human rights, so as to make it more difficult or impossible to achieve targets set by States, certainly given the fact that RDS emissions exceed those of many States?

The interpretative approach to international law allowed the court to come to highly relevant findings on the individual responsibility of RDS. The judgment is a very useful contribution to the developing body of law relating to shared responsibility in international law. While the recent Guiding Principles on Shared Responsibility

in International Law focus on states and international organizations, this judgment shows how the same reasoning extends to private actors.

We can infer from the judgment that the responsibility of RDS is a shared one with that of many actors. For it is only the combination of conduct of all actors that lead to harmful climate change. But this sharing of responsibility does *not* mean that in any way the responsibility of individual actors (states or non-states) is diluted: each actor remains responsible for its own conduct and has to perform its own obligation that aims to prevent harmful effects. On the assumption that an actor has an independent obligation (as the Court found to be the case for RDS) there is no hiding behind others, no room for blame games, no space to pass the buck. Quite apart from the peculiarities of Dutch law, and how the Netherlands can receive international law and soft law in its private law norms, this conclusion will hopefully find its way into climate change litigation worldwide.
